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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 731 [redacted] 6

THATCHER MANUFACTURING COMPANY, H. C. MANDEVILLE, R. W. NIVER, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

STATEMENT AS TO JURISDICTION.

RALPH EMERY,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Civil Action No. 4426

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARTFORD-EMPIRE COMPANY, ET AL.,

Defendants.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, Thatcher Manufacturing Company and individual defendants associated therewith, H. C. Mandeville, R. W. Niver, E. F. Wellinghoff, S. G. H. Turner, Jervis Langdon, W. H. Mandeville, F. W. Swan and Stanton Griffis submit this statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the District Court of the United States for the Northern District of Ohio, Western Division entered in this cause on the 8th day of October, 1942. A petition for appeal was filed on December 3, 1942 and is presented to the District Court herewith on the 3rd day of December, 1942.

Jurisdiction.

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by

Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. Code Sec. 29) and Section 238 of the Judicial Code, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. Code Sec. 345). The statute, as stated in Section 29 of Title 15 U. S. Code is as follows:

> "In every suit in equity brought in any district court of the United States under any of said Acts (§§ 1 to 7, 15 of this title), wherein the United States is Complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof. (Feb. 11, 1903, c. 544, § 2, 32 Stat. 823; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167.)"

The applicable provisions of the statute, as stated in Section 345 of Title 28 U. S. Code are as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts (sections or parts of sections), and not otherwise:
>
> (1) Section 2 of the Act of February 11, 1903, ' "to expedite the hearing and determination" ' of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth (§ 29 of Title 15, and § 45 of Title 49)."

Among the recent decisions sustaining the jurisdiction of this court under similar circumstances are *Interstate Circuit Inc.* v. *United States,* 306 U. S. 208; *Sugar Institute* v. *United States,* 297 U. S. 553; *Atlantic Cleaners and Dyers* v. *United States,* 286 U. S. 427; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436.

This is an appeal from a judgment of the District Court for the Northern District of Ohio, Western Division entered in a suit in equity brought by the United States under Sec-

tion 4 of the Sherman Anti-Trust Act of July 2, 1890, as amended (26 Stat. 209, 15 U. S. Code Sections 3 & 4) the pertinent provisions of which are that the several district courts of the United States are invested with jurisdiction to restrain violations of said act and that such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited.

The statutes involved are as follows:

"Section 1. Trusts in restrain of trade; minimum price contracts; penalty.—Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained (§§ 1 to 7 of this title) shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled ' "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," ' approved September 26, 1941 (§ 45 of this title): Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between

persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby (§§ 1 to 7 of this title) declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.)

2. Monopolizing trade a misdemeanor; penalty.—Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, § 2, 26 Stat. 209.)

4. Jurisdiction of courts; duty of district attorneys; procedure.—The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. (July 2, 1890, c. 647, § 4, 26 Stat. 209; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167.)

The Clayton Act of October 15, 1914, Sections 3 and 15 (Act of October 15, 1914, c. 323, Secs. 3 and 15, 38 Stat. 731 and 736, 15 U. S. C. Secs. 14 and 25):

"Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

"Sec. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court be-

fore which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof."

Said judgment of the District Court contained the following injunction:

"9. The defendants Hartford-Empire Company, and the individual defendants associated therewith; Corning Glass Works, and the individual defendants as-the individual defendants associated therewith; Owens-Illinois Glass Company, and the individual defendants associated therewith; Hazel-Atlas Glass Company, and the individual defendants associated therewith; Thatcher Manufacturing Company, and the individual defendants associated therewith; Lynch Corporation, and the individual defendants associated therewith; Ball Brothers Company, and the individual defendants associated therewith; Glass Container Association of America, Inc., and the individual defendants associated therewith; and the defendants J. D. Dilworth, W. V. Fisher, T. C. Fulton, and G. F. Rieman; and each of them, and all persons and corporations acting and claiming to act on behalf of them, be and they hereby are enjoined from monopolizing, attempting to monopolize, combining and conspiring to monopolize, or agreeing, combining, or conspiring to restrain trade as charged in the complaint herein in violation of the Sherman Antitrust Act and the Clayton Act and be and they hereby are enjoined from engaging in or participating in practices, contracts, relationships, or understandings, or claiming any rights, thereunder, having a tendency to continue or revive any of the aforesaid violations of the Sherman Antitrust Act and the Clayton Act."

The general injunction above set forth is in violation of Rule 65-(d) of the Rules of Civil Procedure and Section 383 of Title 28 U. S. Code. *Standard Co.* v. *United States,* 221 U. S. 1, 80. *New Haven R. R.* v. *Interstate Commerce Commission,* 200 U. S. 361, 404. *Swift and Company* v. *United States,* 196 U. S. 375, 400. *National Labor Rel. Bd.* v. *Express Pub. Co.,* 312 U. S. 426, 435.

Section 383 of Title 28 U. S. Code is as follows:

> "Every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same. (Oct. 15, 1914, c. 323, Sec. 19, 38 Stat. 738.)"

Said judgment of the District Court further required said Thatcher Manufacturing Company and individual defendants associated therewith to file written instruments with the Clerk of said court agreeing to offer and continue to offer to sell machinery used in the manufacture of glassware upon equal terms and conditions of sale to each applicant provided that such sales were not required to be made to any applicant not having a proper credit rating except for cash and provided that the foregoing should not prevent changes in price structure based on a change in economic or market conditions if at least thirty days' notice of such change be given to the glassware industry and that any applicant to whom any of said defendants should refuse to sell machinery as provided above might apply to said dis-

trict court with notice to the defendant who had refused to make such sale, and to the Attorney General of the United States, for an order requiring and directing said defendant to make such sale.

If said defendants failed to agree as aforesaid by filing said written instruments within sixty days from the date of said decree they were enjoined from engaging in the distribution of glassware in interstate commerce.

Said judgment further enjoined each of said defendants from engaging in the distribution of glassware in interstate commerce unless he or it should, by written instrument filed with the Clerk of said district court within ninety days from the date of said decree agree to license without royalty or charge of any kind and for the life of the patents any applicant to make, to have made for it and use any number of machines and methods used in the manufacture of glassware and embodying inventions covered by any patents or patent applications now owned or controlled by each of such defendants, and to agree to license, at a reasonable royalty, any applicant to make, have made for it, and use any number of machines and methods used in the manufacture of glassware and embodying inventions covered by any patents granted on patent applications filed subsequent to the date of said judgment, and then owned or controlled by each of such defendants, and to agree to make available to any licensee copies of drawings and patterns owned or controlled by the respective defendant relating to such machinery or methods used in the manufacture of glassware embodying licensed inventions at a cost not to exceed the cost of preparing the copy plus a reasonable profit.

Said judgment further enjoined each of said defendants, until the entry of a finding by said district court, after petition filed by such defendants on thirty days' notice to the Attorney General of the United States at a hearing thereon that the consequences of conduct of such defend-

ants in violation of the Sherman Antitrust Act and Clayton Act have been fully dissipated from bringing, maintaining or taking any action in pursuance of any suit or suits for infringement of any patent or patents now owned or controlled by any such defendant, covering inventions embodying machinery now used in the manufacture of glassware, or attempting by suit or otherwise to collect royalties or license fees for the use of inventions covered by patents now issued or hereafter issued on applications now pending embodied in machinery used in the manufacture of glassware licensed or leased by any such defendant, except a contract entered into for an outright sale for cash or on credit not to extend over a period of more than two years, and from enforcing or requiring any other party to agree to any provision in any agreement heretofore or hereafter entered into by him which directly or indirectly limits or restricts the type of product which can be produced with or upon machines or equipment or processes embodying inventions licensed under patents or patent applications owned or controlled by him or it, the use of such products so produced, the character, weight, color, capacity or composition of the product so produced, the quantity thereof so produced, the market to or in which the same may be sold or distributed, the price or terms of sale or other disposition of such products, or the use of any machinery or equipment distributed by him or it to use in connection with any other machinery or equipment distributed or inventions licensed by him or it or to use in any specified plant or locality and each of said individual defendants was enjoined from holding or controlling, directly or indirectly, any of the issued and outstanding capital stock, bonds or other evidences of indebtedness of more than one corporation engaged either in the manufacture and sale of glassware or in the manufacture or distribution of machinery used in the manufacture of glassware, except in a fiduciary

capacity, in which case there should be no right to vote the same, and except in the case of subsidiary corporations in which he was an officer, director, agent or employee, or except in a corporation solely engaged in business outside of the United States of America and its territories.

Said judgment further provided that each of said individual defendants who had, on or subsequent to December 11, 1939 sold or otherwise transferred ownership or control of stock, bonds or other evidences of indebtedness of any corporation engaged in the manufacture and sale of glassware or in the manufacture or distribution of machinery used in the manufacture of glassware, other than the one of which he was an officer or director at the time of such transfer, should within seventy days after the date of said judgment submit to the court with notice to the Attorney General, a written statement containing the name or names of those to whom the stock, bonds or other evidences of indebtedness were sold or otherwise transferred, and said individual defendants were enjoined from holding at the same time an office or directorship in more than one corporation engaged in the manufacture and sale of glassware or in the manufacture and distribution of machinery to be used in the manufacture of glassware, except as to subsidiary corporations or corporations engaged solely in business outside of the United States of America or its territories.

Said judgment enjoined the Hartford-Empire Company and its licensees, including Thatcher Manufacturing Company, from carrying out or continuing to observe the provisions of certain licensing agreements in accordance with which Hartford-Empire Company, the owner and holder of patents on machinery and equipment for the manufacture of glassware, leased to Thatcher Manufacturing Company certain machinery and equipment for the manufacture of glassware, granting to Thatcher Manufacturing Company exclusive rights in certain of said machinery and equipment,

particularly milk bottle forming machines, on payment of certain charges and royalties. Said judgment held said contracts to be illegal and terminated the same.

Other provisions of said judgment include injunctions against participation in the activities of Glass Container Association of America, limiting the rights of said defendants in acquiring patents relating to the manufacture of glassware or acquiring or prosecuting applications for such patents or making any agreement involving a limitation in the production of glassware, or filing any so-called trap application for the purpose of provoking an interference in the Patent Office, or any patent application for the purpose of so-called blocking off or fencing in or with the intention of not making commercial use of the inventions covered thereby within four years and requiring said Thatcher Manufacturing Company, subject to any legally recognized privilege, to allow access to its books, ledgers, accounts, correspondence, memoranda, and other records relating to matters involved in said judgment.

The Questions Are Substantial.

The questions involved are substantial and of public importance. The District Court not only terminated the license rights of Thatcher Manufacturing Company and enjoined it and the individual defendants associated with it in general terms but also extended to it and them injunction orders inflicting undue hardships and penalties which had no application to their situation, and were not based on any pleading, or evidence or special finding of fact.

The complaint states (paragraph 128) that subsequent to 1916, and between 1928 and the time of filing the complaint, defendants Hartford and Owens, in order to carry out the conspiracy, monopoly, and combination in restraint of trade thereinbefore alleged, and to maintain, strengthen and extend the said conspiracy, monopoly, and combination in all

its aspects and particularly insofar as it related to patents covering machinery for the manufacture of milk bottles, the manufacture and distribution of such machinery, and the manufacture and distribution of milk bottles, induced the defendants Thatcher and Liberty to join the combination and conspiracy for all purposes and particularly for the purpose of controlling and dominating the issuance of licenses to manufacture milk bottles and of monopolizing and restraining interstate trade and commerce in the manufacture and distribution of milk bottles.

The complaint proceeds to relate the history of the licenses under which Thatcher Manufacturing Company carried on the manufacture of milk bottles by the use of automatic machinery. It was at all times a licensee under patents owned by others and never owned any patent or interest therein except as to the Nagle lehr referred to in paragraph 124 of the complaint where it is alleged that Hartford claimed that the Nagle lehr developed for the defendant Thatcher infringed the Hartford lehr patents and that Hartford in 1937 purchased from Thatcher its patent rights in respect to the Nagle lehrs.

There was some question whether Thatcher Manufacturing Company had any interest in the Nagle lehr patent except such as an employer might have in an invention made by one of its employees and the whole matter was relatively insignificant.

The charges against Thatcher Manufacturing Company were that it and Liberty Glass Company were the only licensees of Hartford machinery except Owens-Illinois Glass Company which had unrestricted licenses and that Thatcher Manufacturing Company had an exclusive license on the Hartford "Two Table" milk bottle forming machine and the right to obtain as many Hartford "single" feeders as it desired at a rate no higher than the lowest rate charged to other licensees.

In this connection it is alleged in the complaint that other licensees had licenses which were restricted in their production, in various particulars which are set forth in paragraphs 139 and 140 of the complaint.

It is alleged in paragraph 141 of the complaint that Hartford had refused from time to time to license additional milk bottle production in order to protect Owens, Thatcher and Liberty from competition and several of such alleged refusals are set forth.

It is alleged, in paragraph 142 of the complaint, that by the reason of the matters stated prior thereto the defendants Owens, Thatcher and Liberty Glass have monopolized and are monopolizing the manufacture and distribution of glass milk bottles in the United States, and have restrained and are restraining interstate trade and commerce in the manufacture and distribution of milk bottles; that Hartford through its dominant control of the patents and its licensing policies, had aided and abetted, and was aiding and abetting, such monopoly and restraint of trade and commerce.

The contractual relations existing between Thatcher Manufacturing Company and Hartford-Empire Company by virtue of the agreement of January 1, 1936, referred to in paragraph 138 of the complaint were not disputed and the contractual relations between them arising out of former license agreements were not disputed. Any participation in any conspiracy or combination in restraint of trade was denied and it was denied that there was any unlawful conduct on the part of Thatcher Manuafacturing Company or the individual defendants associated with it or that the relations between Hartford-Empire Company and Thatcher Manufacturing Company were illegal.

The case against Thatcher Manufacturing Company was based mainly on the allegations that Hartford had refused

from time to time to license additional milk bottle production in order to protect it from competition and had either refused applicants for licenses entirely or had restricted and limited their license while Thatcher Manufacturing Company enjoyed an unrestricted license. In this connection it was claimed that conduct of this character, on the part of Hartford-Empire Company, was the result, in part, of requests of Thatcher Manufacturing Company that other licensees be either denied or restricted, or of knowledge on the part of Hartford-Empire Company that Thatcher Manufacturing Company desired such restrictions.

The District Court held, in effect, that the entire licensing system of Hartford-Empire Company, as it existed at the time of the commencement of the suit, was illegal. On the same theory the court held that the exclusive license rights of Thatcher Manufacturing Company were illegal, that its unrestricted license was illegal when other licenses were restricted and limited, and terminated the contract. If that conclusion of the court, as to the licensing system of Hartford-Empire Company, should be modified, in any respect, on appeal, the rights of Thatcher Manufacturing Company would be affected accordingly.

There was no complaint, or finding, that Thatcher Manufacturing Company or any of the individual defendants associated therewith ever owned any stock in any other corporation engaged in the manufacture of glassware or machinery for the manufacture of glassware except its ownership of stock of Olean Glass Company, a wholly owned subsidiary.

There was no evidence, or finding, that Thatcher Manufacturing Company or any of the individual defendants associated therewith ever owned any patents relating to the manufacture of glassware or machinery for the manufacture of glassware except such interest, if any, as Thatch-

er Manufacturing Company had in the Nagle lehr patent, referred to above, and that was disposed of before the suit was commenced.

Nevertheless the District Court extended to Thatcher Manufacturing Company and the individual defendants associated therewith injunctions and other provisions appropriate only to those who had owned patents relating to the manufacture of glassware or machinery for the manufacture of glassware.

The court also enjoined Thatcher Manufacturing Company and the individual defendants associated therewith from owning stock in more than one corporation engaged in the manufacture of glassware, except its subsidiary Olean Glass Company, thereby requiring those individual defendants to dispose of investments, in stocks and securities, without inquiring whether such an injunction was necessary to accomplish the result sought by the decree and without any proof that any of said defendants had made any such investments for any of the purposes complained of in this case.

The holding of the court that Thatcher Manufacturing Company had committed a violation of the Sherman Anti-trust Act by reason of its relations with Hartford-Empire Company, as lessee and licensee of patented machinery, and that the licensing system of Hartford-Empire Company was illegal, and that Thatcher Manufacturing Company had availed itself of the advantages of that licensing system, did not make it necessary or appropriate to grant an injunction against the individual defendants connected with Thatcher Manufacturing Company requiring them to dispose of investments in stocks and securities not having any connection with the case.

It is contended that the jurisdiction of the Supreme Court to review the said judgment and decree of the District Court

is clear and that Thatcher Manufacturing Company and the said individual defendants associated therewith have, by said judgment and decree, been deprived of substantial contractual rights and substantial rights of a general character entitling them to have their case considered for review.

There is appended to this jurisdictional statement a copy of the opinion of the District Court delivered upon the rendering of the judgment and decree sought to be reviewed and a copy of the same opinion is appended to the jurisdictional statement of Hartford-Empire Company and the individual defendants associated therewith and presented with their petition for the allowance of an appeal to the Supreme Court of the United States from the same judgment and decree to which reference may be made so far as necessary to ascertain the grounds of said judgment and decree.*

Respectfully submitted,

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* (Clerk's Note—The opinion is printed in a separate volume.)